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IN THE
Supreme Court of the United States

UNITEDHEALTH GROUP, INC. F/K/A
UNITED HEALTHCARE CORPORATION, ET AL.,
Petitioners,

v.

LEONARD J. KLAY, M.D., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit

BRIEF FOR BLUE CROSS AND BLUE SHIELD ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Blue Cross and Blue Shield Association ("BCBSA") is the national association of Blue Cross and Blue Shield companies. It comprises 40 independent, locally owned Blue Cross and Blue Shield Plans. The Blue Cross and Blue Shield companies, through relationships with employers, employee benefits plans, and individual subscribers furnish health care coverage to over 91 million Americans.[1]

The Petition for a Writ of Certiorari in this case presents questions concerning the legal standards for certifying class actions under Fed. R. Civ. P. 23. It does so in the context of a massive class action pending in the United States District Court for the Southern District of Florida brought on behalf of hundreds of thousands of healthcare providers against the country's largest managed care entities. Similar putative class actions are pending against BCBSA and the Blue Cross and Blue Shield companies in the same court. Because the approach adopted by the Court of Appeals in this case potentially impacts BCBSA and its members in the litigation pending against them, BCBSA has an interest in the Petition.

Counsel for the parties have filed letters with the Clerk of the Court consenting, in global manner, to the filing of all *amicus* briefs supporting either side in this action.

SUMMARY OF ARGUMENT

The Court of Appeals's decision will have national implications for the healthcare industry. This suit is just one of innumerable actions brought by providers against health insurers that, as a result of action by the Judicial Panel on Multidistrict Litigation ("MDL Panel"), are

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[1] In accordance with Rule 37.6, BCBSA certifies that counsel for a party did not author this brief in whole or in part and that no entity other than BCBSA, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

currently pending in the same District Court in this Circuit. In these many actions, providers seek to restructure the health insurance industry suitable to their interests. Given the scope of the allegations, the classes that the providers seek to have certified, and the defendants they have named, the cases potentially affect nearly every provider in the nation (both physician and non-physician), almost every major insurer, and the tens of millions of Americans who are those insurers' subscribers.

The class certification decision alone may accomplish the providers' ends. That is because, as this Court and others have readily recognized, a class certification determination in high stakes litigation places heavy pressure on defendants to settle rather than risk financial ruin, even when the claims have no merit. Yet, had this case proceeded in a different Circuit – indeed, in one of the other District Courts the MDL Panel had as an option for the initial transfers – it might never have been certified as a class action, due to the severe split in the Circuits on the issues raised in the Petition. If the entire healthcare industry is to be drastically altered, it should not be as a consequence of which Circuit determined the class certification issue. The Court should grant the Petition to ensure that any such restructuring would result from a certification decision that is correct, not from the forum selection for the actions.

ARGUMENT

THE COURT OF APPEALS'S DECISION HAS NATIONAL IMPLICATIONS FOR A CRITICAL INDUSTRY

The Court of Appeals described this action as potentially "all against all." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1276 (11th Cir. 2004). With the certification of the class, the suit pits, on the one side, the nation's physicians against, on the other side, most of the country's

major managed care entities. Furthermore, because the physicians seek large-scale retroactive and prospective increases in the amount of reimbursement to them from the managed care companies, the action could potentially affect every subscriber of those companies as well. Increases in the reimbursement amount for every treating physician inevitably will increase the cost of health insurance for subscribers. Even more directly, coinsurance obligations of subscribers oftentimes are a percentage based on the overall payment allowance that their insurer establishes for the provider, meaning that any subscriber coinsurance obligations may increase as the payment level to providers increases. *See Pascack Valley Hosp., Inc. v. Local 464A UFCW Welfare Reimbursement Plan*, No. 03-4196, U.S. App. LEXIS 22632, at *25-*27 (3d Cir. Nov. 1, 2004) (noting impact of provider claims on subscribers); *Everson v. Blue Cross & Blue Shield of Ohio*, 898 F. Supp. 532, 543-44 (N.D. Ohio 1994) (discussing the effect of provider reimbursement levels on subscribers' coinsurance).

Overall, the Court of Appeals indicated that the case could involve a class of 600,000 physicians. *See* 382 F.3d at 1273. And it has elsewhere been estimated that the suit affects insurers and subscribers encompassing "about half the nation's managed care market." *HMOs*, Miami Daily Business Review, Sept. 11, 2003, Vol. 3, No. 9-11, at 8.

And that is just half the picture. This case is only the earliest action among many putative federal class actions brought by providers against health insurance entities, all of which are now pending before the U.S. District Court for the Southern District of Florida. The MDL Panel has transferred nearly 100 separate actions involving providers against health insurers to this particular District Court. *See, e.g., In re Humana Inc. Managed Care Litig.*, No. 1334, 2000 U.S. Dist. LEXIS 5099 (J.P.M.L. Apr. 13, 2000); *In re Humana Inc. Managed Care Litig.*, No. 1334, 2000 U.S. Dist. LEXIS 15927 (J.P.M.L. Oct. 23, 2000); *In re*

Managed Care Litig., 246 F. Supp 2d 1363 (J.P.M.L. 2003); *see also* Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation 2004, Index to Transferee Districts with Multidistrict Litig., at 17 (at http://www.jpml.uscourts.gov/StatisticalAnalysis2004.pdf).

Also among the pending actions are two suits against BCBSA and local Blue Cross and Blue Shield Plans, one brought by physician providers and the other by non-physician providers including chiropractors, podiatrists, optometrists, opticians, social workers, nurse practitioners, and acupuncturists. *Thomas v. Blue Cross & Blue Shield Ass'n*, No. 03-21296-CIV-MORENO/KLEIN (S.D. Fla.); *Solomon v. Blue Cross & Blue Shield Assn'n*, No. 03-22935-CIV-MORENO/KLEIN (S.D. Fla.). If these suits are certified as class actions in the manner proposed by the suing providers, and given the breadth of the provider networks that the Blue Cross and Blue Shield entities have created, the class of plaintiff physicians here may likewise number in the hundreds of thousands; and any class of non-physician practitioners, if certified as these providers seek, possibly might be as numerous. Moreover, because the Blue Cross and Blue Shield companies provide health benefits and insurance to more than 91 million individuals, the segment of the general population that potentially may be affected by the two suits against the Blue Cross and Blue Shield entities is very large.

As a result of all of these suits and the MDL Panel's decisions, nearly the entire healthcare industry is enmeshed in litigation in a single District Court: namely, all of the major companies that provide health benefits and insurance and most of the nation's providers, with the effects of the cases conceivably spilling over to almost the whole insured population of the country. Because the suits seek review of claims payments going back as far as 1990, *see Klay*, 382 F.3d at 1250, and request, as damages, additional amounts that providers allegedly should have received in those

payments, the number of transactions that the providers attempt to place in issue could be staggering. The injunctive relief sought in the actions – *i.e.*, the alteration of claims processing practices for future claims for payment – places at risk potentially all future claims payment transactions.

A decision to certify a class in these actions has the potential to remake this critical industry. Indeed, that reportedly was the litigation's objective from the start. *See, e.g.*, Beverly Kraft, *Scruggs Eyes Massive HMO Lawsuit*, The Clarion-Ledger (Jackson, MS), July 10, 2000, at 1B; *Pascagoula Attorney Plans Massive Lawsuit Against HMOs*, Associated Press State & Local Wire, July 10, 2000 [hereinafter "Associated Press Report"]; Mike Cleary, *Lawyer Files Suits Against 5 HMOs*, Washington Times, Nov. 25, 1999, at B8; *see also* Susan Beck, *HMO Postmortem*, The American Lawyer, Oct. 13, 2003. Certainly, Respondents' allegations are aimed at challenging fundamental aspects of the health insurance business, including the procedure codes used when processing claims, the timing for making payments, and the manner in which insurers create provider networks. *See Klay*, 382 F.3d at 1252-53.

The certification decision alone may lead to the restructuring Respondents seek because of the now well-recognized dynamic that certification creates. As this Court has stated: "[C]ertification of a large class may so increase the defendant's potential liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("In the context of mass tort class actions, certification dramatically affects the stakes for defendants."); *see also* Associated Press Report (reporting that attorney in original companion case to Respondents' action stated: "My strategy has

always been to raise the stakes as high as possible. It puts incredible pressure on everyone to settle it.").

The practical reality is that, in this litigation, the certification of a class places heavy pressure on Petitioners to accede to some of Respondents' demands and settle, rather than "roll the dice" and possibly incur "potentially crippling, even bankrupting" damages awards. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1254 (2002). Two defendants – Aetna Health Inc. and CIGNA HealthCare – have already settled with Respondents, agreeing to substantial changes in the manner in which they do business. *See In re Managed Care Litig.: Class Plaintiffs v. Aetna Inc.*, No. 00-1334-MD-MORENO, Final Approval Order and Judgment (Oct. 24, 2003) (approving Aetna settlement); *In re Managed Care Litig.: Shane v. Humana, Inc.*, No. 00-1334-MD-MORENO, Order Approving Settlement Among CIGNA Healthcare and Physicians, Certifying Class, and Directing Final Judgment (Feb. 2, 2004).

If the industry is to be remade on a national scale, it should not be on the back of a Court of Appeals decision that conflicts with the decisions of sister circuits. For instance, as the Petition explains, it cannot be disputed that, had this action proceeded in a court in the Fifth Circuit, no class could have been certified, in light of that Circuit's ruling that "a fraud class action cannot be certified when individual reliance will be an issue." *Castano*, 84 F.3d at 745; *accord Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 211 (5th Cir. 2001), *cert. denied*, 540 U.S. 819 (2003). The irony is that one of the original actions commenced by Respondents and at issue in the MDL Panel's first order was a case filed in the U.S. District Court for the Southern District of Mississippi – in the Fifth Circuit. *See In re Humana Inc. Managed Care Litig.*, 2000 U.S. Dist. LEXIS 5099, at *1. Had the MDL

Panel chosen a Mississippi venue, rather than a Florida venue, for the transferred actions, the physician class would not have been certified.

The Court should grant the Petition to ensure that, if this industry is to undergo significant alteration at the behest of litigation, it does so only as a consequence of a correct class certification decision, not as a result of the forum the MDL Panel chose. The Petition presents important questions of class action procedure on which the Circuits are in conflict; the prospect that one Circuit's view of the law will have immediate nationwide import – as the Court of Appeals's decision here would have – makes even more compelling the case for granting the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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